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CASE CLIPS

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CRIMINAL LAW ISSUES

QUERY v. STATE, No. 49S02-0008-CR-502, ___ N.E.2d ___ (Ind. Apr. 11, 2001).
BOEHM, J.

This case deals with the circumstances under which the State must obtain a new search warrant if information undermining the probable cause in that warrant is discovered by the police after the warrant has been granted but before it has been executed. We hold that where the State learns that a material fact establishing the probable cause underlying a search warrant is incorrect, the State is obliged to inform the issuing magistrate of the new facts and, if it fails to do so, the warrant is per se invalid. Information is material if it might affect either the issuance of the warrant, or the scope of the warrant. We find this case presents an extremely unusual example of an immaterial change. Although the new information undermined the crime suggested by the information supplied to the magistrate, it also provided probable cause for a second crime, and, if a second search warrant had been issued, the police would have been authorized to search the same location for virtually identical items.

. . . .

In this case, the correcting information obliterated probable cause for a search for evidence or fruits of a methamphetamine sale, but simultaneously created probable cause for a search for evidence or fruits of a sale of a look-alike drug, a Class D felony. This is not a trivial change. We think, however, it is not a "material" one because the old information justified a warrant for the same location and virtually the same items. In the end, the officers did exactly what they would have done anyway to execute a warrant based on the new information. . . .

It is important to note, however, that both the validity and scope of the search must be unaffected to render the information immaterial. This case presents very unusual facts. We do not intend to encourage police or prosecutors to withhold new or correcting information from magistrates. Indeed, it is difficult to think of another circumstance in which new information would destroy probable cause for one crime and, at the same time, create probable cause for another crime where the parameters of the resulting search in either case would be identical. Police who do not keep the issuing magistrate fully informed of any new or correcting information run the risk that the information will be found to have been material. That will be the result if either the validity or the scope of the warrant was affected. If so, the original search warrant will be held invalid and the fruits of that search suppressed.

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SHEPARD, C. J., and DICKSON, J., concurred.

RUCKER, J., filed a separate written opinion in which he dissented and in which SULLIVAN, J., concurred, in part, as follows:

I respectfully dissent. . . .

. . . .

In my view this materiality exception is problematic because it runs afoul of both the United States and Indiana constitutional guarantees that a neutral and detached magistrate determine the existence of probable cause. Instead, it leaves into the very hands of those who are "actively involved in investigating [the] crime" the determination of whether the new information is material and thus whether probable cause exists. . . .

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MITCHELL v. STATE, No. 49S00-9906-CR-343, ___ N.E.2d ___ (Ind. Apr. 16, 2001).

DICKSON, J.

Officer Boomershine's instructions and intentions were to make a traffic stop for the stop sign violation. The State does not argue that, as of the time of the traffic stop, Officer Boomershine had any independent probable cause or sufficient reasonable suspicion to justify the stop, except for the traffic law violation. Officer Boomershine was thus initially justified only in making the stop and requiring Mitchell to exit the vehicle during the completion of the traffic citation. Mitchell's apparent nervousness and then relief does not give rise to a reasonable suspicion that he was armed and a danger to the officer's safety. From Officer Boomershine's testimony, it appears that Mitchell cooperated with the traffic stop. He handed over his license and the rental agreement and then exited the car when asked and stepped to the rear of the vehicle. Boomershine testified that "I then patted him down for my safety on his exterior clothing," but the officer's testimony did not express or explain any reasons for his safety concerns. [Citation to Record omitted.]

We conclude that neither the officer's routine traffic stop of Mitchell for a stop sign violation, nor Mitchell's conduct after being stopped, provided any basis justifying the officer's pat down search of Mitchell. . . .

. . . .

SHEPARD, C. J., and BOEHM, and SULLIVAN, JJ., concurred.

RUCKER, J., concurred, in part, and concurred in the result, in part, without filing a separate written opinion.

WILSON v. STATE, No. 55S01-0104-CR-208, ___ N.E.2d ___ (Ind. Apr. 16, 2001).

DICKSON, J.

As a result of a handgun found during a police pat-down search in the course of a traffic stop for speeding, the defendant, Derek Wilson, was convicted of possession of a handgun without a license, a class A misdemeanor. [Footnote omitted.] The Court of Appeals affirmed. Wilson v. State, 727 N.E.2d 775 (Ind. Ct. App. 2000). The defendant seeks transfer, asserting that the pat-down search was a violation of the Fourth Amendment. We grant transfer and reverse.

. . . The trooper testified, "Before I put anybody in my car, whether they're broke down on the side of the highway or what, I pat them down for weapons for my own safety." [Citation to Record omitted.] Prior to and at the time of the pat-down search, Wilson had not exhibited any violent, resistant, or furtive movements, and the trooper did not have any suspicion that Wilson was armed. . . .

. . . .

[T]o subject the stopped motorist to a frisk for weapons is permissible only if "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Terry, 392 U.S. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909. . . .

The State argues that whenever an officer places someone in the officer's car, it is reasonable, prudent, and warranted for the officer to conduct a preliminary pat-down frisk for weapons. We acknowledge that, when an officer places a person into a patrol car that will be occupied by the officer or other persons, there is a significantly heightened risk of substantial danger to those in the car in the event the detainee is armed. [Footnote omitted.] We believe that this increased risk is sufficient to satisfy the requirements of Ybarra [v. Illinois, 444 U.S. 85, 94, 100 S.Ct. 338, 343, 62 L.Ed.2d 238, 247 (1979)], and that it is generally reasonable for a prudent officer to pat-down persons placed in his patrol car, even absent a belief of dangerousness particularized to the specific detainee. The question presented by today's case, however, is slightly different because the totality of circumstances here involves the reasonableness during a routine traffic stop of placing a motorist in the police car thereby subjecting him to a preliminary pat-down search.

. . . [W]e decline to hold that the Fourth Amendment permits the police routinely to place traffic stop detainees in a police vehicle if this necessarily subjects the detainee to a preliminary pat-down frisk. An officer is not using the least intrusive means to investigate a traffic stop if, without a particularized justification making it reasonably necessary, he places a person into his patrol vehicle and thereby subjects the person to a pat-down search. [Citation omitted.]

[T]he trooper testified that there was a range of field sobriety tests that could have been performed outside his patrol vehicle, and even the horizontal gaze test the officer planned to administer did not require being in his vehicle. [Citation to Record omitted.] The officer also had the option of allowing Wilson to stay in his car and take a portable breath test. [Citation to Record omitted.] With all the options that were available to the officer, neither the officer nor the State has identified any reasonably necessary basis to place Wilson in the police car justifying the heightened intrusion of a pat-down search. . . .

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SHEPARD, C. J., BOEHM, RUCKER, And SULLIVAN, JJ., concurred.

CIVIL LAW ISSUES

BEMENDERFER v. WILLIAMS, No. 49S02-0005-CV-296, ___ N.E.2d ___ (Ind. Apr. 10, 2001).

BOEHM, J.

The Court of Appeals affirmed the denial of partial summary judgment, concluding that: (1) the death of a surviving beneficiary during the pendency of a lawsuit does not limit wrongful death damages to medical, hospital, funeral, burial, and administrative expenses; and (2) loss of consortium damages are recoverable beyond the date of the injured spouse's death when death is the result of the tortfeasor's negligence. Bemenderfer v. Williams, 720 N.E.2d 400, 407-08 (Ind. Ct. App. 1999). [Footnote omitted.]

. . . .

We agree with Williams that the policy concerns cited by the parties are at least in equipoise, and perhaps favor Williams. . . . [U]nder these circumstances, the very purpose of the law invoked by Bemenderfer—compensation of pecuniary loss—is furthered by allowing recovery. The wrongful death defendant should not be allowed to avoid compensation to a beneficiary merely because the beneficiary, as an elderly person

profoundly affected by the death of a spouse, is more vulnerable than the average person. It is a staple of tort law that the tortfeasor takes her victim as she finds him. [Citation omitted.]

Requiring that the beneficiary survive to the date of judgment would also create a cut-off that is arbitrary and unsupported by statute. . . . Because the plain language of the statute requires only that the beneficiary survive the wrongful death victim and because in our view policy concerns advise in favor of allowing Hoy's estate to prosecute his claim, we hold that the statutory beneficiary's claim does not abate if death ensues prior to verdict.

In sum, the legislature is of course free to limit recovery to statutory beneficiaries who survive until judgment, as Bemenderfer urges. But we conclude that it has not done so. Because we conclude that Hoy's damages did not abate upon his death, and because, as an heir, Williams stands to recover those damages, we do not address the Court of Appeals' conclusion that Dillier [v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 34 Ind. App. 52, 57, 72 N.E. 271, 273 (1904)] establishes that Williams may bring a separate action to recover her pecuniary losses. Bemenderfer, 720 N.E.2d at 405. It is also unnecessary to address the Court of Appeals conclusion that because Hoy could have proceeded directly under the Medical Malpractice Act, his claim survives his death under the survival statute. Id. at 407.

. . . Williams maintains that loss of consortium damages should be assessed for the period of time between Dorothy's death and Hoy's death. Bemenderfer claims that to the extent loss of consortium damages are appropriate, they may be recovered only for the three days between Dorothy's surgery and her death because a loss of consortium claim does not continue beyond the date of the injured spouse's death.

As we explained today in Durham v. U-Haul International, although the common law rule may have been that loss of consortium damages are not recoverable after the date of the injured spouse's death, loss of consortium damages have long been recoverable beyond this date under the wrongful death statute. [Citation omitted.] . . .

. . . .

SHEPARD, C. J., and DICKSON, RUCKER and SULLIVAN, JJ., concurred.

MARK v. MOSER, No. 29A02-0010-CV-623, _____ N.E.2d _____ (Ind.Ct.App. Apr. 9, 2001).

BAKER, J.

Today we are called upon to clearly define the standard of care one competitor owes another in a sporting event. Although this court may have tangentially addressed the issue in the past, there has been no case since the adoption of the Comparative Fault Act where an in-depth analysis was warranted. Thus, the precise issue we must decide is whether a participant in an athletic activity may recover in tort for injury as the result of another participant's negligent conduct.

. . .The uncontroverted facts are that on September 7, 1997, Rebecca Mark (Rebecca) and Kyle Moser (Kyle) were co-participants in a triathlon competition in Marion County,. . . . Before the competition, each triathlon participant agreed to abide by the rules adopted by USA Triathlon. In addition, all the participants signed an entry form, which included a waiver provision and release from liability.

During the bicycling leg of the triathlon, Kyle was riding on the left side of Rebecca and cut in front of her. As a result, the two bicycles collided and Rebecca was hospitalized with serious injuries. . . .

Many people might think that Rebecca's claim would be barred because she in some way incurred, or assumed, the risk of injury by participating in the sporting event. However, under present Indiana law that would not necessarily be the case if the standard of care

was negligence. On January 1, 1985, Indiana adopted the Comparative Fault Act (the Act). IND. CODE § 34-51-2-1 to -19. . . . For purposes of defining comparative fault, the term "fault" includes "any act or omission that is negligent, willful, wanton, reckless, or intentional towards the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages." I.C. § 34-6-2-45(b). This inclusion of "incurred risk" in the definition of fault abolishes incurred risk as a complete bar to recovery and establishes that the fault of each party should be apportioned. [Citation omitted.] Thus, under Indiana law, if we adopt negligence as the standard of care between co-participants in a sporting event, it would be a question of fact for the jury to decide whether the plaintiff in any way incurred the risk of harm but is, nevertheless, entitled to recover for his injury.

. . . .

After reviewing the decisions of other jurisdictions that have considered this issue, we are convinced that a negligence standard would be over-inclusive. Specifically, we believe that adopting a negligence standard would create the potential for mass litigation and may deter participation in sports because of fear of incurring liability for the injuries and mishaps incident to the particular activity. Further, we believe that the duty of care between co-participants in sports activities is sufficiently distinguishable from Indiana cases where a student athlete sues an educational institution or its representatives, to merit a heightened standard of care. . . . Finally, as a matter of policy, we prefer to avoid the need to hold a jury trial to determine whether the plaintiff incurred the risk of injury in every case involving a sports injury caused by a co-participant. We can prevent this necessity by adopting an objective primary assumption-of-risk doctrine and a standard of care greater than negligence. Accordingly, we hold that voluntary participants in sports activities assume the inherent and foreseeable dangers of the activity and cannot recover for injury unless it can be established that the other participant either intentionally caused injury or engaged in conduct so reckless as to be totally outside the range of ordinary activity involved in the sport. [Footnote omitted.] . . .

In addition, because we recognize that rule infractions, deliberate or otherwise, are an inevitable part of many sports, a co-participant's violation of the rules of the game may be evidence of liability, but shall not per se establish reckless or intentional conduct.

. . . .

The foregoing standard means, in essence, that an action will lie in tort between co-participants in sports events "when players step outside of their roles as fellow competitors" and recklessly or intentionally inflict harm on another. [Citation omitted.] A player will be considered to have acted in reckless disregard of the safety of another player if "he does an act, or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable person to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." Restatement (Second) of Torts § 500 (1965). . . .

Applying the foregoing standard, liability will not lie where the injury causing action amounts to a tactical move that is an inherent or reasonably foreseeable part of the game and is undertaken to secure a competitive edge. Thus, where a baseball pitcher throws the ball near the batter to prevent him from crowding the home plate, and the ball ends up striking the batter and causing injury, the pitcher's conduct would not be actionable. . . .

In contrast, if a co-participant vents his anger at another player by means of a physical attack, such conduct would be actionable. . . .

> [I]t is our view that adoption of the recklessness or intentional conduct standard preserves the fundamental nature of sports by encouraging, rather than inhibiting, competitive spirit, drive, and strategy. . . .
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BROOK and BARNES, JJ., concurred.

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